

E-FILED on 6/7/07

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

NEIL B. GOLDBERG,
Plaintiff,

v.

JAMES CAMERON, GALE ANN HURD, et
al.
Defendants.

No. C-05-03534 RMW

ORDER TENTATIVELY GRANTING
DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S SECOND AND SEVENTH
CAUSES OF ACTION IN THE SECOND
AMENDED COMPLAINT

[Re Docket Nos. 44, 46]

I. NATURE OF THE MOTION

In August 2005, plaintiff Neil Goldberg, a resident of Santa Cruz, California, filed suit against defendants James Cameron and Gale Ann Hurd. According to Goldberg, Cameron and Hurd allegedly misappropriated plaintiff's copyrighted works and used them in all three movies of the *Terminator* trilogy. On February 27, 2007, the court granted defendants' motions to dismiss plaintiff's claims as time-barred, permitting Goldberg to amend his complaint to attempt to state a claim as to the third *Terminator* movie.

In his second amended complaint, Goldberg seeks (1) an injunction and damages for copyright infringement; (2) return of all benefits under a theory of conversion; (3) recovery for

breach of implied contract; (4) an injunction and damages under Cal. Bus. & Prof. Code § 17200; (5) an accounting; and (6) declaratory relief. On April 17, 2007, after the parties had stipulated to extend the time for the defendants to respond to the second amended complaint, Hurd moved to dismiss Goldberg's second claim for breach of implied contract and seventh claim for negligence pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing, *inter alia*, that these claims are time-barred. Defendant Cameron joined the motion. On May 11, 2007, Hurd submitted a notice of non-opposition that plaintiff had failed to submit an opposition defendants' motion. Plaintiff did not submit an opposition. However, plaintiff's counsel did appear for the motion after it had been called and granted on the 9:00 a.m. calendar and noted that defendants had noticed the motion for 10:30 a.m. Therefore, the court hereby gives plaintiff ten days in which to put in writing what he intended to say at the May 26, 2007 hearing. Absent a showing of good cause for failing to respond to the motion and a showing that the motion should not be granted for the reasons set forth below, the court will grant the motion.

II. ANALYSIS¹

Defendants move to dismiss plaintiff's breach of implied contract claim and negligence claim as barred by the statute of limitations. They also move to dismiss plaintiff's breach of implied contract claim on the grounds that plaintiff fails to allege the existence of a contract between Goldberg and Hurd or Goldberg and Cameron.

A. Statute of Limitations

The plaintiff's breach of implied contract claim is subject to a two-year limitations period. *Davies v. Krasna*, 14 Cal. 3d 502, 516 (1975) (breach of confidence cause of action subject to a two-year statute of limitations); *Rokos v. Peck*, 182 Cal. App. 3d 604, 619 (1986) (breach of confidence and breach of implied contract claims have identical statute of limitations period). Plaintiff's negligence claim is subject to a two-year statute of limitations. Cal. Code of Civil Procedure § 339. Plaintiff's claims accrued when he first suffered "appreciable and actual harm." *Davies*, 14 Cal. 3d at 535.

¹ The underlying facts of this action are well-known by the parties, therefore the court will not repeat them here.

Defendants seek judicial notice that *Terminator 3* was released on July 2, 2003. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Here, there is no dispute that *Terminator 3* was released on July 2, 2003, so the court will take judicial notice of this fact.

As the court previously held, the date plaintiff's claim originally accrued with regard to *Terminator 3* can be no later than the date on which it was released in 2003. As the movie was released on July 2, 2003 and plaintiff's complaint was not filed until August 25, 2005, plaintiff's breach of implied contract claim as to *Terminator 3* is untimely. *Cf. Kourtis*, 419 F.3d at 1001. Although plaintiff has amended his complaint to state that he was unaware of the alleged breach of implied contract until within two years of filing the action,² as before, the court sees no reason to apply any delayed accrual principle. It has already determined that plaintiff's delay in filing this lawsuit was unreasonable and plaintiff has pleaded no other facts that would alter that determination.


B. Failure to State a Claim

Because the court concludes the plaintiff's second and seventh causes of action are time-barred, it need not reach the merits of defendants' argument that plaintiff fails to state a claim for breach of implied contract.

III. ORDER

For the foregoing reasons, and because plaintiff failed to oppose the motion, the court tentatively grants defendants' motions to dismiss. Plaintiff's claims for breach of implied contract and negligence are tentatively dismissed in their entirety as time barred without leave to amend.

DATED: 6/6/07


RONALD M. WHYTE
United States District Judge

² In the first amended complaint, plaintiff previously alleged that he was unaware of the claim until within three years of filing the complaint, rather than two years. *See* First Amended Complaint ¶ 14.

1 Notice of this document has been electronically sent to:

2 **Counsel for Plaintiff:**

3 Donald Charles Schwartz trialaw@cruzio.com

4 **Counsel for Defendants:**

5 Charles Nathan Shephard cshephard@ggfirm.com
6 Bruce Alan Isaacs bisaacs@wymanisaacs.com
David Boren dboren@wymanisaacs.com

7
8 Counsel are responsible for distributing copies of this document to co-counsel that have not
9 registered for e-filing under the court's CM/ECF program.

10
11 **Dated:** 6/7/07

12 /s/ MAG
Chambers of Judge Whyte